IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

WRIT PETITION No.3525 OF 2003

PETITIONER :

Ram Kishore Sharma
Aged about 42 years
S/o Shri Mahadeo Prasad Sharma, Senior Horticulture Development Officer,
Dharamjaigarh, District Raigarh (C.G.)

P. R. No. 3326/03
Presented by Shri R. D. Gupta
dated 26.10.03

VERSUS

RESPONDENTS :

1. State of Chhattisgarh,
Through Secretary,
Department of Agriculture,
D.K.S. Bhawan, Mantralaya,
Raipur (C.G.)

2. The Director,
Directorate of Agriculture,
Government of Chhattisgarh,
Raipur (CG)

3. Fakira Singh, Asst. Director,
Horticulture, Koriya,
Chhattisgarh.

4. Hakim Singh Chouhan
Asst. Director, Horticulture,
Raigarh (C.G.).

5. P.N. Tiwari, Asst. Director,
Horticulture, Directorate of Agriculture, Raipur (C.G.).

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Clerk to A. G. Bilaspur

शपथ आयुक्त
एस. के. शुक्ला
बिलासपुर (छ.ग.)
तहसील सेल

6. K.K. Pandey, Asst. Director, Horticulture, Korba (C.G.).

7. K.K. Mishra, Asst. Director, Horticulture, Rajnandgaon, Chhattisgarh.

WRIT PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 3525 of 2003

Petitioner Ram Kishore Sharma

Versus

Respondents State of Chhattisgarh and others

Post for order on 19th July, 2006.

Sd/-
Satish K. Agnihotri
Judge

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 3525 of 2003

Petitioner Ram Kishore Sharma

Versus

Respondents State of Chhattisgarh and others

Single Bench : Hon'ble Mr. Justice **Satish K. Agnihotri**.

Shri H. S. Patel, Advocate for the petitioner.
Smt. Anju Ahuja, Deputy Govt. Advocate for the respondents No.1 and 2.
Shri Pawan Kesharwani, Advocate for the respondent No. 7.
None for the other respondents.

ORDER

(19th July, 2006)

The following order of the Court is passed by **Satish K. Agnihotri, J.**

1. This petition under Article 226/227 of the Constitution of India impugns the order dated 7.8.2003 (Annexure P/1) whereby the petitioner was not found fit for promotion to the post of Assistant Director, Horticulture, by applying the criteria of seniority-cum-merit.

2. The undisputed facts in nutshell are that the petitioner was appointed as Senior Horticulture Officer vide order dated 30.11.1985 (Annexure P/2) for a period of six months and posted at Block- Kesla, District- Hoshangabad. Thereafter vide order dated 20.11.1989 (Annexure P/3) the petitioner was given regular appointment after confirmation by the Mini Service Selection Board, Bhopal vide notification dated 7.1.1989.

3. The petitioner challenges his placement at serial No. 17 in the gradation list published on 4.7.2003, showing the position as on 1.4.2003 on the ground that his seniority for appointment on the post of Senior Horticulture Officer should be considered from 16.12.1985.

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4. The petitioner claims relief in this petition to the limited effect that the order of promotion dated 7.8.2003 (Annexure P/1), whereby the respondents No. 3 to 7 have been granted promotion to the post of Assistant Director, Horticulture, without following the provisions of law, as prescribed in Agriculture (Horticulture) Gazetted Service Recruitment Rules, 1987 (for short 'the Rules, 1987'), be quashed and fresh promotion list be prepared in accordance with the Rules, 1987.

5. Shri H. S. Patel, learned counsel appearing for the petitioner submits that the Departmental Promotion Committee (DPC) has not followed the Rules, 1987. Rule 15 (2) clearly provides that "the selection for inclusion in such list shall be based on merit and suitability in all respect, with due regard to seniority." According to learned counsel, the DPC has applied the principle of merit-cum-seniority on the basis of certain instructions which are contrary to the Rules, 1987, framed in exercise of the powers conferred to the Governor of Madhya Pradesh by proviso to Article 309 of the Constitution of India.

6. Smt. Anju Ahuja, learned counsel appearing for the respondents/State produced a copy of the DPC proceeding dated 19.7.2003 along with notification dated 3rd September, 2003 and submitted that in view of the Circular dated 31st January, 1997 the DPC has followed the principles of seniority-cum-merit (वरीयता –सह– योग्यता), and supported the proceedings of the DPC held on 19.7.2003.

7. Despite several notices to the respondents No. 3, 4, 5 and 6, none appeared for the respondents No. 3 to 6.

8. Shri Pawan Kesharwani, learned counsel appearing for the respondent No.7 adopts the submission made by learned counsel appearing for the respondents/State.

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9. I have heard learned counsel for the parties and perused the records appended to the petition and return, as well as the departmental promotion committee proceedings, held on 19.7.2003, produced by learned counsel for the respondents No. 1 and 2.

10. Admittedly, the promotion of Senior Horticulture to the post of Assistant Director, Horticulture is governed by the Rules, 1987. These Rules are framed by the Governor of the Madhya Pradesh in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India. The reliance of the DPC. on some general administrative departmental circulars, ignoring the provisions of Rules 1987, is illegal.

11. The Supreme Court in the case of **Secretary, State of Karnataka and others Vs. Umadevi (3) and others** {(2006) 4 SCC 1}, held in para 6, as under:-

> *"6. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (see Basu's Shorter Constitution of India). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedures which specify the necessary qualifications, the mode of appointment, etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those*

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persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognized that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed."

12. In the above case the Supreme Court clearly held that "*if the Rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules.*" Admittedly, the promotions of the respondents No. 3 to 7, along with others, to the post of Assistant Director, Horticulture, have been made not in accordance with the Rules 1987. Rule 15 of the said Rules, 1987 reads as under:-

"15. **Preparation of List of suitable Officers.**—(1) The committee shall prepare a list of such persons as satisfy the condition prescribed in rule 14 above and as are held by the committee to be suitable for promotion/transfer to the service. The list shall be sufficient to cover the anticipated vacancies on account of retirement and promotion, during the course of one year from the date of its preparation of the selection list. A reserve list consisting of twenty five per cent of the number of persons included in the said list shall also be prepared to meet the unforeseen vacancies during the course of the aforesaid period.

(2) The selection for inclusion in such list shall be based on merit and suitability in all respect, with due regard to seniority.

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(3) The names of the officers included in the list shall be arranged in order of seniority in the service or posts, as specified in column (2) of Schedule IV, at the time of preparation of each select list :

Provided that any junior officer, who in the opinion of the Committee, is of exceptional merit and suitability may be assigned in the list a higher place than that of officers senior to him.

Explanation.—A person whose name is included in a select list but who is not promoted during the validity of the list, shall have no claim to seniority over those considered in a subsequent selection merely by the fact of his earlier selection.

(4) The list so prepared shall be reviewed and revised every year.

(5) If, in the process of selection/review or revision it is proposed to supersede any member of the service, the committee shall record its reasons for the proposed supersession."

13. The criteria for selection and promotion to the post of Assistant Director, Horticulture from the post of Senior Horticulture Officer is minimum required experience of five years and merit and suitability with due regard to the seniority. The Supreme Court in the case of **Union of India Vs. Mohan Lal Capoor and others** { (1973) 2 SCC 836} while considering the Regulation 5 (2) of the Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, 1955, where the Regulation 5(2) is pari-materia to Rule 15(2) of the Rules, 1987, held in para 37, as under:-

"37. And, when Regulation 5(2) says that the selection for inclusion in the list shall be based on merit and suitability in all respects with due regard to seniority, what it means is that for inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or, if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale....."

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Similarly, **Hon'ble Shri M. H. Beg J.** (as he then was) observed in para 22, as under:-

> *"22. Thus, we think that the correct view, in conformity with the plain meanings of words used in the relevant Rules, is that the 'entrance' or 'inclusion' test for a place on the select list, is competitive and comparative applied to all eligible candidates and not minimal like pass marks at an examination. The Selection Committee has an unrestricted choice of the best available talent, from amongst eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is the governing factor....."*

Regulation 5(2) of the Regulations, 1955 reads as under:-

> *"5(2) The selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority."*

Rule 15(2) of the Rules, 1987 reads as under:-

> *"15(2)The selection for inclusion in such list shall be based on merit and suitability in all respect, with due regard to seniority."*

14. The above view was later on referred and affirmed by the Supreme Court in the case of **B. V. Sivaiah and others Vs. K. Addanki Babu and others** {(1998) 6 SCC 720}.

15. In view of the authoritative pronouncements of the Supreme Court in the cases cited above, it is clear that the DPC had not followed the criteria of merit and suitability with due regard to seniority, while considering the cases of the petitioner and respondents No. 3 to 7 for promotion to the post of Assistant Director, Horticulture from the post of Senior Horticulture Officer. Thus, the DPC proceedings and thereafter the promotions of the respondents No. 3 to 7 to the post of Assistant Director, Horticulture on the basis of the principle of seniority-cum-merit is bad and illegal, being not in accordance with

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the provisions of law. The departmental promotion committee proceeding dated 19.7.2003 is quashed.

16. For the reasons stated above, this petition is allowed and the impugned order dated 7.8.2003, passed on the basis of the recommendation made by the DPC in its meeting dated 19.7.2003, is quashed. The respondents No. 1 and 2 are directed to consider the case of the petitioners along with other similarly situated officers for promotion to the post of Assistant Director, Horticulture in accordance with the provisions of the Rules, 1987, as on 19.7.2003, within a period of three months from the date of receipt of a copy of this order. No order as to costs.

Sd/-
Satish K. Agnihotri
Judge

Thakur